

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of)
)
Implementation of Section 309 (j))
Of the Communications Act)
-- Competitive Bidding for Commercial)
Broadcast and Instructional Television)
Fixed Service Licenses)
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)
Reexamination of the Policy)
Statement on Comparative)
Broadcast Hearings)
)
Proposals to Reform the Commission's)
Comparative Hearing Processes to)
Expedite the Resolution of Cases)

MM Docket No. 97-234

GC Docket No. 92-52

GEN Docket No. 90-264

COMMENTS OF WOLFGANG V KURTZ

To: The Commission

The Rant

The following comments relate specifically to those portions of the electromagnetic spectrum set aside for access to the airwaves in the name of constitutionally protected speech. While the Telecommunications Act of 1996 addressed a much broader range of issues, the provisions relating to broadcast license acquisition and ownership represent the largest shift in public policy regarding broadcast mass media and citizen access thereto since 1934.

The proposed auction process for broadcast licensing is the capstone on a long process of the privatization of broadcast spectrum set aside for public speech, at a time when technology has equalized the economies of scale of operation, enabling small community broadcasters to compete effectively with medium and large broadcast conglomerates. The assertion that liberalized ownership rules have in some manner "saved" failing stations is a popular one among those who benefit from the "reformed" regulations and was never more false than now. The cost of construction and operation of broadcast facilities is falling fast, a fact that is not lost on the major broadcast companies. Through the auction process, the costs of "purchasing" a license will escalate to levels only accessible to these same large corporations.

As long as portions of the electromagnetic spectrum are set aside for general address of the public, whether it be for purposes of broadcasting television programming, music, talk or other speech protected under the 1st Amendment, there will be the right for 1st Amendment speakers to have access to these public resources on the least restrictive basis possible. The provision of equitable access is one of the primary functions of the Federal Communications Commission, one that has been mismanaged in the past and is abrogated by the NPRM as it now stands.

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List A B C D E

Arguably, the abandonment of the basic mission of the Federal Communications Commission (in this respect) is almost complete in the proposals set forth in this NPRM and in regulation reform presently under-way. One only need look back at past "public interest" casualties like diversity in ownership and programming, the Fairness Doctrine, community programming origination and license holding periods and then look forward to those protections about to fall like personal attack restrictions and public file obligations. Not to mention the present and future inability of the average American or small business to be engaged in broadcast in the community that they call home.

Since the inception of the FCC, notwithstanding the tortuous path to obtaining a broadcast license, individuals and small organizations have pioneered commercial and non-profit broadcasting. The number of broadcast facilities originated and constructed by the large media corporations of today is negligible. The broadcast spectrum was developed to its present level of success protected to some extent by the former regulatory process. That the proposed regulations do not protect the public interest, and those who have historically served it, is not surprising as the Act that sponsored them was largely written by broadcast industry lobbies that have no regard for the public interest except when faced with enforcement by regulatory agencies.

With the passage of the Telecommunications Act of 1996, the massive transfer of broadcast licenses to large non-community based broadcast companies has resulted in less responsiveness on their part to the communities they "serve" in terms of locally originated programming, accurate and unbiased news coverage and presence and employment in the community. They continue intensive lobbying for removal of the few regulatory protections that remain.

The Next Generation?

In December 1996, my partner and I received a grant for 92.1 MHz in Houston, Alaska. Because of the location of our transmission facility we also serve Anchorage, Arbitron market 162. Unknown to us, concurrent negotiations were underway which resulted in the transfer of 13 of the 18 commercial AM and FM signals to 2 large broadcast companies. As a result of this, our ability to attract sales and marketing talent, the essential ingredient of successful commercial broadcasting, was severely compromised and we lost the interest of market leaders in sales who would have formerly risen to the challenge (and risk) of building a new business.

As a matter of fact, if we hadn't been able to negotiate a Joint Sales Agreement (JSA) with one of the large companies, we would have been unable to fulfill our obligations to construct and operate under our construction permit. The JSA provided access to sales talent as well as client and agency advertising sales that would have been inaccessible to us as an independent operator building a new business. If this was the result of the anti-competitive nature of relaxing ownership limits, the proposed auction process would only serve to further limit or completely eliminate the ability of independent operators to construct and operate new facilities by increasing the up-front costs of licensing.

I am 31 years old; my partner is 27. We were, and are not wealthy. I believe that what we have achieved in acquiring a license in a medium-size market and building a commercial FM station from scratch is unique in this decade. I can predict that, under the proposed regulations, similar opportunities will never occur again - for us or for anyone else - unless meaningful protections for local ownership are written in. As a matter of fact, if I could have foreseen the present regulatory environment, never mind the proposed regulations, I doubt that I would have spent a month and a half driving around the Lower 48 in a borrowed pick-up shopping for a used transmitter. It would have been much simpler, and possibly more economical, to sign the Construction Permit over to a broker and let someone else build it.

The reasons for our venture into community broadcasting have been thoroughly compromised by the "regulation reform" to this date. We are actively trying to package our station for sale with some of the remaining independent operators. The only satisfaction we're likely to receive from our investment in commercial broadcast is the pay-off for transferring our "public trust" to any third party willing to come into the market and compete on the same scale as the other foreign corporations.

Specious Rationale

The relationship between local ownership and the degree of community service a station performs can not always be reduced to direct effects. Value and degree of service is often based on subjective criteria and perception and difficult to quantify in terms like number of households reached or km² of signal coverage. Claims of service are naturally subject to arbitration, hence a competitive hearing process. It is one of the only ways to weigh and thereby reduce the subjective and indirect public interest values inherent in a broadcast license application to a final decision awarding a license. It may not have been proven on the record that local ownership leads to improved service. However, if an owner lives, shops, and meets with citizens in the same community in which his station purports to purvey some sort of service, he is subject, at the least, to comments from acquaintances who live in the same community. How can any reasonable person deny such an effect is not for some good.

Furthermore, the claim that no proven relationship exists between local ownership and the degree of community service a broadcaster provides is an arbitrary one, based in large part on court cases, where the mechanisms to determine the value have been sabotaged or reasons for existence eliminated. The fact this statement was made is largely self-serving as the parties with the resources are not inclined to want to study the relationships involved or even admit their validity.

The proposed new regulations make timid attempts to justify non-monetary values such as local or minority ownership, but then backhand them with references to the Bechtel case. The Bechtel case was resolved against the FCC due to the failure of the FCC to protect the public interest. It is quite evident to any observer with a basic understanding of legal matters that the standing regulations were subject to a successful legal challenge. The court, in its decision, merely pointed out the obvious inconsistency in the regulatory process brought about by the removal of the license holding period. That the license holding period was removed, entirely through the influence of the broadcast industry, is not to the FCC's credit.

The competitive hearing method of resolving conflicts in applications for AM/FM/TV, flawed in the indicated manner, was further invalidated due to the FCC's lack of consistency in application and enforcement of provisions of the licensing process and the absence of interest on the part of the FCC in remedying flaws through progressive changes in regulation. This was largely at the behest of the broadcast industry which has consistently taken advantage of these flaws and inconsistencies after assisting in their introduction. Lobbying continues for the reduction or elimination of restrictions on the activities of broadcasters while they chip away at the public's ability to react on an informed basis. This pattern of behavior led to the invalidation of the former hearing process by the judiciary because of inherently obvious hypocrisy.

The proposed regulations signal surrender to those who've made a mockery of the former licensing process. They question the intent and constitutionality of the Act that fostered them. Was it the intention of Congress through this Act to sell access to first amendment speech over the public airwaves to the highest bidder?. Income from these auctions will be relatively insignificant because, under the present technical regimen, the opportunities for new licenses are extremely limited. If the argument is that income is needed to offset the deficit and or reduce the debt, then why not recover income from the trade in licenses which would be a more beneficial means of contributing to the Treasury?

Furthermore, the long term effects of implementing this auction scheme will insure that new spectrum and new services providing access to that spectrum set aside for constitutionally protected speech will be restricted to those individuals and organizations with means far beyond the ordinary. The contribution to the Treasury will be approximately equivalent to 30 pieces of silver less a kiss.

Lessor of Many Evils

According to enactments of Congress, the sale of public assets will continue to take place. Compromise if any, will be achieved in the short term by substantive changes in regulation. Congress has granted the FCC the authority to enact these changes. The FCC must take the lead in protecting the public interest, insofar as is possible. As a demonstration of this leadership, the Commission should open another period of comment on the proposed regulations, perhaps after the collation and review of the present round of comments. The comments submitted under this docket should be made available for public review through the FCC web-site. The Commission should require licensed broadcasters to notify the public through FCC prepared Public Service Announcements (PSA's) of the comment period and the issues under consideration.

This NPRM was published in the Federal Register, the existence of which the public is largely ignorant, and awareness of the proposed regulations is exclusive to a limited audience within the broadcast industry and the Government. The broadcast media, almost without exception, has neglected to make any good faith effort to inform the public about the Act, the proposed regulations, and their possible effects.

Some of the following measures and proposals fall beyond the purview of the present regulatory process, but taken together in various combinations, are a more complete approach to progressive reform of regulations. Some are probably not practical given the broadcast industry forces arrayed against them.

Free the Spectrum!

Spectrum should be freed for development by community based licensees. How is this possible? In the FM band, 2nd and (especially) 3rd adjacent channel restrictions are a remnant of 1960's technological restrictions and licensing considerations long since invalidated. The reasoning behind the channel spacing was based on two premises. The first was that FM radios used to have considerably more difficulty tuning in stations close to one another on the dial. The second was that spacing out licenses across the band in a given community would create gaps on the dial in outlying communities or suburbs. These outlying areas would be far enough away so that they could apply for stations in the gaps, thereby providing local service.

Nowadays all the gaps are filled, and most of the local service that is possible and practical under present regulations – exists. Furthermore, AM, FM and TV tuner technology specific to channel selectivity has improved radically. The justification for these regressive regulations no longer exists.

Fight the Power!

Transmission power of broadcast stations and the resultant protected coverage areas can be reduced. Technical efficiencies in signal propagation and the scarcity of service have long been used to defend the license classes now used. A broadcast station that has a marginal signal in a community 80 miles away can obstruct new service in that community based on claims of interference founded in outmoded and anti-competitive regulations. Usage of modern computer modeling programs suggests that little of this interference is significant and, in any case, is offset by increased free speech access by potential community licensees and residents.

In the digital TV proceedings, much was made of equivalent coverage, assuring broadcasters that they will reach the same audience with digital TV transmissions that they presently reach through current NTSC technology. Licensees have no claim to coverage. It is the benefit to the public which must be considered. A new service can provide coverage. Waivers can be granted in those rare instances where higher power results in a benefit to the public until such a time as a community based channel is requested. Liberalizing and modernizing the technical aspects of coverage regulations, balanced by the public interest, should be an integral part of regulation reform.

Non-Renewable Resources

The length of license should better reflect regulatory practice and in practice licenses should be limited to a defined span after which the license lapses– permanently. The present license periods are just exercises for collecting regulatory fees. Under the current regime there's very little reason why after grant of a license, an individual or organization cannot possess it forever. For practical purposes, this public asset is passed on to perpetual private use, rhetorically in the public interest. Eternal licensing is not in the public interest.

The process of broadcast licensing may benefit from using the rather more enlightened approach employed in assigning copyrights and patents. Consider that a limited term of protection is given to the creative effort of an individual or organization. Why should private individuals or organizations be assigned public resources in perpetuity, to be traded at will for a profit? A long-term license period, say 20 years, would give a broadcaster adequate time to recoup any investment made and make an enduring impact on the community.

Ownership Limits

As described throughout these comments, the relaxation of ownership limits has contributed to a general decline in service to the public. This de-regulation has also resulted in a destabilization of the broadcast industry which will likely become very evident in the next few years. I have discussed this subject with station managers, sales managers and even corporate vice-presidents. The uniform response from these mid-echelon industry insiders is that the last round of consolidation was bad for the broadcast business.

The present and continuing consolidation has seriously impaired open competition in medium-size markets. It has decreased competition in the development of, and access to, programming. Loopholes in the existing regulations, like JSA's, allow station groups to expand their programming and marketing influence beyond local ownership limits. Even worse, speculators in the license trade have leveraged deals for broadcast properties beyond the ability for the property to reasonably recover in income.

When the bill comes due for these excesses, when the public offering monies run dry, who will be left to face the consequences? Not the brokers who have already made their commissions nor the corporate officers with their hefty severance clauses. No, this is at the expense of the public interest and the licenses involved will forever drift in some elevated stratum anchored there by a very large price tag.

Finally, who exactly requested this relaxation of ownership limits? No one I know – and I know quite a few people in the broadcast industry. Who exactly was the FCC performing this service for? The public?

New Services

With the relaxation of adjacent channel restrictions and/or a reduction in transmission power for currently existing license classes, there exists an opportunity for new broadcast services in virtually every community. Whether these newly available channels would fall under the traditional licensing classes should be a subject of a future rule-making process. In any case, this would be an excellent chance for establishment of a low power commercial license class restricted by regulation to community based ownership and access.

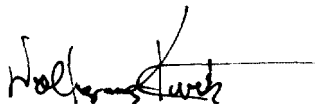
Regardless of whether or not some of the more progressive (and provocative) approaches described above are implemented, it is vital that ownership limits be re-examined and a new formula arrived at. If auctions are to proceed, they must allow for inclusion of non-monetary values in the application and bidding process to protect the public interest in community originated constitutionally protected speech.

Synopsis

The predicted financial benefits attributed to the requirements of the Budget Act and application of the Telecommunications Act of 1996 to AM, FM and TV broadcast bands will not be realized to any significant extent. Nationwide, this spectrum is largely occupied or frozen for the foreseeable future. Therefore income to the Treasury derived from auction of new licenses will not be significant. No attempt has been made to increase proportional regulatory and spectrum "user" fees to provide income to the Treasury, a much more lucrative and balanced, although undoubtedly less popular, proposition. A different approach should have been taken by Congress to achieve their deficit reduction goals. Notwithstanding this oversight, there is considerable leeway in the regulatory process to make it less inimical to citizen access to broadcast licenses.

The majority of the few opportunities that remain for new service are for lower power facilities. Furthermore, it is likely that a new low-power commercial service for FM will be instituted in the near future. These services are well suited for individual and small business access to the public airwaves in the communities that they serve. The auction proposal is as anti-competitive to these applicants as it is competitive from the fund-raising perspective. Balance needs to be achieved in regulation reform. Balance that provides for *community* access to, and licensing of, commercial broadcast channels.

It is my earnest hope that, through balanced and progressive development of new regulations, the harm done to the public interest by Congress in passing the Telecommunications Act of 1996 can be compensated for to some extent.



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